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Circumstantial Evidence In Establishing Causal Connection

The South Carolina Supreme Court in a number of decisions has consistently held that where medical testimony is not relied on to establish causal connection, lay testimony and other facts and circumstances may be sufficient to support a conclusion of causal connection between the claimed disability or death and the accident. The court has, with equal clarity, established that when the testimony of medical experts solely is relied upon to establish causation, then the expert testimony must be that the death or disability "most probably" resulted from the accident.[1]

The problem for the practicing attorney in trial court is to determine whether the presence or absence of medical testimony is conclusive. In *Grice v. Dickerson*[2] the court established the rule that where medical testimony recognized the possibility of causal connection, the claimant could establish the fact of causal connection by circumstantial evidence and need not rely solely upon medical testimony for an award.

Glenn v. Dunean Mills[3] provided a sensible, workable rule for compensation cases. The court held that where the facts and circumstances surrounding the injury or death of the employee are sufficiently convincing, causation need not be proved by medical testimony. In this case several employees were repairing a leak in an air-conditioning unit. In the course of repairs they permitted freon gas to escape, forming a vapor that forced the employees from the room. Shortly after they returned, the deceased collapsed and was taken to the hospital. Though he had previously enjoyed excellent health, he died shortly thereafter. Other employees testified to ill effects from the gas, contending that it left them dizzy and with a tight feeling in the chest. The claimant offered a publication from the manufacturer supporting the inference that exposure to the gas for a sufficient length of time could prove fatal. The claimant did not offer an autopsy report, death certificate or other medical evidence establishing the probable cause of death. The only expert testimony was offered by

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1. *E.g.*, Grice v. Dickerson, 241 S.C. 225, 127 S.E.2d 722 (1962).
2. *Ibid.*
3. 242 S.C. 535, 131 S.E.2d 696 (1963).

the employer in an attempt to establish that an employee could not die from the exposure that occurred. In an excellent decision the South Carolina Supreme Court affirmed an award where death obviously resulted from accidental means, but where medical testimony was not available to meet the "most probable" rule.

Kennedy v. Williamsburg County[4] again illustrates the problem confronting the trial attorney who must obtain medical testimony in accord with the rule that medical witnesses must be able to use the words "most likely or most probably." The reluctance of medical witnesses to testify that any given medical condition is "most likely" the result of an accident is particularly true of doctors who do not frequently testify in the courts. Many times doctors privately express to an attorney the opinion that an accident is a causal factor or a causal condition of an injury but are reluctant to say that the accident was the "most likely cause." Medicine is not an exact science, and doctors are frequently unable to establish proof to support their opinion under rigid cross examination. In the *Kennedy* case for example, one medical witness testified that the causal connection with a possibility. Later when asked if it was probable, he replied, "yes sir, I'll have to go along with that."[5] Another medical witness stated first that "it could be a factor,"[6] and finally that, "I would feel that this was the precipitating factor."[7]

The case involved an employee, admittedly injured in a compensable accident, who later developed a totally disabling paranoid-schizophrenia. The defendants denied that there was any causal connection between the disability and his injury. The majority opinion held that although other inferences could be drawn from the medical testimony, it was the opinion of the court that "the most probable rule was met," though, in fact, the words "most probably" and "most likely" were not used by the testifying physicians. The majority opinion further observed that there was other evidence, circumstantial in nature, which tended to support the finding of a causal connection between the disability and the injury.

This case, together with the *Glenn* case, is an excellent example of the importance of lay testimony and circumstantial evidence

4. 242 S.C. 477, 131 S.E.2d 512 (1963).
5. *Id.* at 482, 131 S.E.2d at 515.
6. *Ibid.*
7. *Ibid.*

in establishing a reasonable inference of causal connection where the medical testimony is absent or questionable.

In *Dennis v. Williams Furniture Corp.*[8] the claimant failed to establish sufficient facts to support a claim of compensation. The medical testimony of the claimant was weak and unsatisfactory and did not support the contention of the claimant that his alleged injury had resulted in a ruptured or degenerated disc. The claimant, although admitting by his testimony that he had a previous back condition, alleged that his injury aggravated the pre-existing condition. The court held that whether the absence of medical testimony under the "most probable" rule was fatal to any particular case depended upon the facts and circumstances of each case, and that in this case the claimant had failed to provide sufficient facts to establish causal connection. The court further decided that the finding of fact by the commission that the claim was filed within the statutory time, without stating any reason therefore, constituted a conclusion of law and was therefore reviewable. Although this decision was filed after the *Kennedy* and *Glenn* cases, it is easily distinguishable from those two decisions and does not indicate any restriction of the opinion in them.

Coverage

In *White v. J. T. Strahan Co.*[9] the deceased performed work for a pulpwood producer engaged in cutting timber, the logs being delivered to one party and the pulpwood from the tracts being delivered to the defendant company. The defendant company for a stipulated payment each week provided workmen's compensation coverage for the employer of the deceased. The employer was exempt from the mandatory provision of the act. The court concluded that the operation by the employer Jones of cutting standing timber that produced logs for one party and pulpwood for the defendant Strahan constituted one action; and that since the deceased lost his life while engaged in producing logs, the deceased was engaged in work that was incidental and necessary to the production of pulpwood for the defendant Strahan.

Bridges v. Wyandott Worsting Co.[10] involved the determination of whether or not the defendant woolen manufacturer, who

8. 243 S.C. 53, 132 S.E.2d 1 (1963).
9. 244 S.C. 120, 135 S.E.2d 720 (1964).
10. 243 S.C. 1, 132 S.E.2d 18 (1963).

owned and operated its own electric system from which part of the power to operate the plant was obtained, was engaged in a part of the general trade and business when it was in the process of installing a heavier duty power line from the facilities fo the Duke Power Company to the plant. The plaintiff, an employee of the Collins Electric Company engaged to perform the work for the defendant, was injured, and brought this action against the defendant manufacturer company. The court observed that the defendant regularly employed a crew of maintenance men to perform electrical work and acknowledged the difficulty in laying down any hard and fast rule with regard to activities such as repair and maintenance. The court held that the maintenance and repair of the electrical system was a part of the work performed by the defendant in the manufacture of woolen goods.

In *Sola v. Sunny Slope Farms*[11] the deceased employee performed work at the packing plant of the defendant and additional work (although the testimony conflicted) at the labor camp maintained for the employees of the defendant. His work at the labor camp was done at night, and it was necessary for him to cross the railroad tracks going from the packing shed to the labor camp. He was killed crossing the track while travelling between the two places of employment. The court affirmed an award by the Industrial Commission based upon the conclusion that necessary travel between two regular places of work had the effect of bringing the place of injury within the scope and course of his employment.

In *South Carolina Industrial Comm'n v. Progressive Life Ins. Co.*[12] the court affirmed the order of the commission that the defendant life insurance company was subjected to the Workmen's Compensation Act where the employee agents received guaranteed minimum wages plus commissions, had minimum quotas to meet, were furnished supplies by the defendant, given limited territories to work, and were subject to the company's general power to discharge or fire at will. The court held that the power to terminate the relationship without liability is not consistent with the relationship of an independent contractor.

Skipper v. Marlowe Mfg. Co.,[13] involved not only the question of estoppel, extending the time for the filing of a claim, but also the length of time after the period of estoppel has ended that

11. 244 S.C. 6, 135 S.E.2d 32 (1964).
12. 242 S.C. 547, 131 S.E.2d 694 (1963).
13. 242 S.C. 486, 131 S.E.2d 524 (1963).

the claimant had to file a claim. In this case the general manager of the defendant had told the claimant not to worry about her accident and that everything would be taken care of. In reliance upon these assurances, the claimant instructed her attorney to withdraw her legal action. Six weeks prior to the expiration of the one year limitation period for filing a claim, the claimant determined that she could no longer rely upon the defendant's conduct to take care of her claim. Her claim was filed sixty days after the estoppel period ended but more than one year had expired from the date of her accident. The court held that the length of time after the period of estoppel has ended in which the claimant has to decide to file a claim has not been determined in our state. Some authorities allow a claimant a reasonable time and others allow the claimant a period of time equal to that designated in the act for filing claims. The court in this case held that by awarding compensation the commission implicitly had found that the claimant had proceeded within a reasonable length of time and such a finding constituted a finding of fact and therefore would be binding upon the court.

Unusual Exertion Rule

Black v. Barnwell County[14] is another example of the difficulty that the commission and the court have found in trying to apply the "unusual exertion rule." The deceased, the sheriff and jailor of Barnwell County, for some time prior to his death had suffered from a weak heart. On September 27, 1960, the deceased was required to make seven or eight trips within approximately an hour's time up a steep flight of stairs. He suffered a heart attack on the following day. He died within a period of approximately two weeks. The majority held that there was no material dispute in the medical testimony as to causal connection. Since conflicting inference could be drawn from the evidence as to whether or not the climbing of the stairway constituted an unusual and extraordinary exertion and because the commission had found as a fact that the claimant did not sustain any injury by accident, the majority felt that the court was bound by the finding of the commission as to the failure of the claimant to establish a compensable accident.

In a strongly worded dissent, Mr. Justice Bussey observed that the only findings of fact made by the commission were "that the

14. 243 S.C. 531, 134 S.E.2d 753 (1964).

claimant has failed to sustain the burden of proof necessary in proving his claim as required by many South Carolina Supreme Court decisions involving such death cases. 'That the claimant . . . did not sustain any injury by accident arising out of and in the course of his employment resulting in his death.' "[15]

On appeal the attorney for the claimant had challenged the findings as being conclusions of law. Apparently there were no reasons stated in the record for this finding of fact adopted by the full commission. In *Dennis v. Williams Furniture Co.*,[16] *supra*, the court stated that although a finding of the commission was denominated as a finding of fact, it would be reviewable as a conclusion of law if no reason for such finding was given. It is difficult to distinguish between the findings of fact in the *Dennis* case, which the court unanimously concluded were only conclusions of law and thus subject to review, and the findings of fact in the *Black* case which the court approved.

The *Dennis* decision was a welcome step in the direction of requiring Industrial Commission awards to clearly distinguish between findings of fact and legal conclusions. The *Black*[17] opinion was disappointing because it affirmed a similar type of finding of fact that had met with disapproval in the *Dennis* case.

15. *Id.* at 537, 134 S.E.2d at 756.

16. 243 S.C. 53, 132 S.E.2d 1 (1963).

17. The commission award had been made with a record that included medical testimony later ruled incompetent by the circuit court without appeal by the defendants. Although the ultimate decision of the commission and the court may have been the same, there is every argument that the case could have been remanded to the commission with instructions to make clear and reasoned findings of fact as distinguished from conclusions of law.